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In the Supreme Court of the United States

OCTOBER TERM, 1984

GLEN ADKINS AND TOM ADKINS, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

REX E. LEE
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2201

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Petitioners claim that the district court erred by admitting a Dun & Bradstreet financial report on their business, on the grounds that the report was inadequately authenticated and was hearsay because the government failed to identify the source of the information contained in the report.

1. Following a jury trial in the United States District Court for the Southern District of Texas, petitioners and three co-defendants were convicted on five counts of mail fraud, in violation of 18 U.S.C. 1341. Petitioners were sentenced to concurrent terms of five years' imprisonment on three of the counts, to be followed by concurrent terms of five years' probation on the two remaining counts. Petitioners were also fined $5,000. The court of appeals affirmed (Pet. App. 1a-13a; 741 F.2d 744).

a. The evidence adduced at trial, the sufficiency of which is not in dispute, showed that petitioners and their co-defendants executed a scheme to defraud companies in the business of financing the purchase of heavy machinery for firms that needed such equipment, but were unable to purchase it themselves or to obtain an ordinary bank loan. In a typical transaction, the leasing company, after determining that the business was creditworthy, would purchase the machinery from a vendor and lease it to the business. The vendor would send the equipment directly to the lessee, who, in turn, would notify the leasing company that the machinery had arrived and was in good working condition. The leasing company would then pay the vendor for the equipment and receive monthly payments from the lessee for use of the machinery.

Petitioners owned Southwestern Manufacturing and Equipment Company, which posed as a vendor company but in fact was a "shell" corporation with no equipment to sell (15 R. 545; 17 R. 917).[1] Using the alias "Alan Perlman," petitioner Glen Adkins convinced numerous leasing companies to finance the sale of equipment to a company owned by co-defendants Walter Cannon and Ron Hawkins, Powerguard of Texas, which had no use for, and never received, any of the equipment allegedly supplied to Powerguard by petitioners. In the first six months of 1981, petitioners obtained roughly $511,000 from several finance companies for machinery that was never delivered to Powerguard. Powerguard later defaulted on the leases, and, when the victim companies tried to collect their collateral — the heavy machinery allegedly purchased from Southwestern — they discovered that it did not exist and that they had been duped by petitioners and their co-defendants.

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[1]The citations to the record are taken from the government's brief in the court of appeals.

b. At trial, John Peyton, a representative of one of the victimized finance companies, Misco Leasing Company, testified that before Misco agreed to do business with Southwestern, it purchased a financial report on Southwestern (GX 6EE) from Dun & Bradstreet, Inc. (Pet. App. 19a-21a; 14 R. 294-300). The report identified, among other things, Southwestern's corporate officers, the number of its employees, the amount of its office space, and the firm's credit rating. The report further stated that this information had been provided to Dun & Bradstreet on February 5, 1981, by "Allister Williamson," the company president, and that other information had been provided on July 28, 1980, by "Steven Pronam," a Southwestern office manager. However, the report was false in every material respect: the "Allister Williamson" and "Steven Pronam" who supposedly worked for Southwestern did not exist, and the other information regarding Southwestern's office and financial status was equally false.

Petitioners objected to the introduction of the report on the ground that the report had been prepared by Dun & Bradstreet, rather than by Misco Leasing, and the information contained in the report did not originate from Southwestern. See Pet. App. 20a-21a. The district court overruled the objection (*ibid.*). Other witnesses, when shown the report, testified that the information that it contained was false (see, *e.g.*, *id.* at 26a-30a).

b. The court of appeals affirmed petitioners' convictions (Pet. App. 1a-13a). The court rejected petitioners' claim that the report was inadmissible hearsay, reasoning that the government did not use the report to prove the truth of the information it contained, but simply to show that the report contained statements describing petitioners' corporation that the government proved were false through independent evidence (Pet. App. 3a-4a).

2. Petitioners claim (Pet. 4-7) that the Dun & Bradstreet report (GX 6EE) was inadequately authenticated (see Fed. R. Evid. 901) and was hearsay (see Fed. R. Evid. 801) because the government failed to identify the source of the information contained in the report. For several reasons, petitioners' claims lack merit.

a. To begin with, petitioners did not object in the district court on the ground that the report was inadmissible under Rule 901 (see Pet. App. 20a-21a); they therefore may not assert that claim on appeal. See Fed. R. Evid. 103(a)(1). In any event, Rule 901 simply requires "evidence sufficient to support a finding that the matter in question is what its proponent claims." Here, the government established a prima facie case that GX 6EE was a Dun & Bradstreet report of Southwestern, petitioners' corporation, that was based upon information supplied to Dun & Bradstreet by petitioners.

The report identified itself as a Dun & Bradstreet report, and John Peyton, a representative from Misco Leasing Company, which had received the report, identified the report as the one that Misco Leasing had received from Dun & Bradstreet (Pet. App. 20a-21a; 14 Tr. 294-300). It is also well established that Dun & Bradstreet prepares financial reports on commercial businesses based largely upon information received from the subject companies. See *United States* v. *Beecroft*, 608 F.2d 753, 761 (9th Cir. 1979); *Missouri P. R.R.* v. *Austin*, 292 F.2d 415, 420 (5th Cir. 1961). The report also identified the source of the information it contained as Southwestern employees "Allister Williamson" and "Steven Pronam." Because other evidence at trial showed that no such persons existed and that petitioners were the only employees of Southwestern, it was entirely reasonable for the district court to conclude that petitioners had provided Dun & Bradstreet with the description of Southwestern contained in the report. The

district court therefore did not abuse its discretion in finding that GX 6EE had been sufficiently authenticated to permit the report to be admitted. Petitioners' objection goes only to the weight that the report should have received, not to its admissibility. See, *e.g., In re Japanese Electronic Products Antitrust Litigation*, 723 F.2d 238, 284-285 (3d Cir. 1983), petition for cert. pending, 83-2004;[2] *Capital Marine Supply, Inc.* v. *M/V Roland Thomas, II*, 719 F.2d 104, 106 (5th Cir. 1983).[3]

b. Petitioners' hearsay objection to the Dun & Bradstreet report (Pet. 7-8) also lacks merit. As the court of appeals recognized (Pet. App. 3a-4a), the government used the report for the purpose of showing that it contained statements describing Southwestern, petitioners' corporation, not to prove that those statements were true. On the contrary, the government showed through independent evidence that the statements in the report were false. Using the report for this purpose raises no hearsay issue, because a declarant's out-of-court statements constitute hearsay only if they are offered to prove the truth of the matters asserted therein. See Fed. R. Evid. 801(c); *Anderson* v. *United States*, 417 U.S. 211, 219-220 (1974); *Dutton* v. *Evans*, 400

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[2]Because the petition in No. 83-2004 does not raise either of the questions presented by the petition in this case, there is no occasion to hold this case pending the Court's disposition of that petition.

[3]None of the cases cited by petitioners (Pet. 6) conflicts with the court of appeals' decision in this case or supports their position. In *United States* v. *Beecroft, supra*, the court held that a Dun & Bradstreet financial report was properly admitted at trial. 608 F.2d at 760-761. *United States* v. *Scott*, 668 F.2d 384 (8th Cir. 1981), is not relevant to petitioners' claim. And any alleged intra-circuit conflict between the Fifth Circuit's decision in this case and the earlier Fifth Circuit decisions cited by petitioners is for the Fifth Circuit, not this Court, to resolve.

U.S. 74, 88 (1970) (plurality opinion).[4] Review by this Court of petitioners' claims is thus unwarranted.[5]

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

REX E. LEE
Solicitor General

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[4]Petitioners also argue (Pet. 7-8) that admission of the report violated their rights under the Confrontation Clause. Petitioners did not raise this claim in the district court (see Pet. App. 20a-21a) or in the court of appeals, however, and thus may not assert it here. See *United States* v. *Lovasco*, 431 U.S. 783, 788 n.7 (1977). In any event, petitioner's confrontation claim suffers from the same flaw as their hearsay contention. See *Dutton* v. *Evans*, 400 U.S. at 88 (plurality opinion) ("[n]either a hearsay nor a confrontation question would arise had [an out-of-court declarant's] testimony been used to prove merely that the statement had been made").

[5]Moreover, any error was harmless. Representatives from eight of the leasing companies victimized by petitioners testified at trial that, after Powerguard defaulted on its lease agreements, the leasing companies attempted to repossess the machinery that they had supposedly purchased from Southwestern, but discovered that the equipment was either worthless or non-existent. See 14 R. 101-126, 176-197, 230-254, 289-316; 15 R. 368-378, 459-467, 475-482, 500-519. The Dun & Bradstreet report was a minor item of evidence admitted at trial. Given the testimony of the victims of petitioners' scheme, the report could not have materially affected the jury's verdict. See generally *United States* v. *Hasting*, 461 U.S. 499 (1983).